

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

76-1228

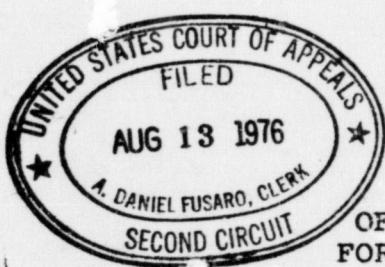
To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :
Plaintiff-Appellee, :
-v.- :
JULIO MARCELINO a/k/a/ LUCKY, :
Defendant-Appellant. :
-----X

BPLS
Docket No. 76-1228

BRIEF FOR APPELLANT PURSUANT
TO ANDERS V. CALIFORNIA



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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PURSUANT TO ANDERS V. CALIFORNIA

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QUESTION PRESENTED

Whether there are any non-frivolous issues in this
case to be raised for this Court's review.

STATEMENT PURSUANT TO RULE 28(a) (3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Marvin E. Frankel) rendered on April 27, 1976, convicting appellant of conspiring to possess and distribute a Schedule I narcotic drug (Count I) (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(a)). Appellant was sentenced to the custody of the Attorney General for a period of seven and one-half years, and to a special parole term of three years.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

I. Introduction

In a superceding indictment filed on December 4, 1975, the Government charged 24 defendants, two unindicted co-conspirators and others unknown to the Grand Jury with conspiring, from January 1, 1975 to the date of the indictment, to violate the Federal Narcotics Laws.* The Government's theory, in essence, was that the 24 conspirators combined to possess and distribute over 100 pounds of Mexican brown rock heroin. The heroin was

* The indictment is set forth as "B" in Appellant Separate Appendix. The indictment also charged one co-defendant, Fernando Gallardo, with three other counts of narcotics law violation. Mr. Gallardo did not appear on trial to answer the charges.

imported, packaged and sold in Los Angeles by several of the co-conspirators to other co-conspirators from New York who brought the Heroin back to New York where in turn they stored and re-sold the heroin in much smaller quantities to still other co-defendants (3).* A trial commenced on March 1, 1976, against appellant Julio Marcelino, a "tail-end" buyer in New York, and five of the other co-conspirators -- Jose Perez Lopez, Miguel Valles, Tomas Valles, Enrique (Gordito) Valles and Luis Garcia. Following a trial of almost three weeks, and jury deliberations lasting more than three days, appellant was convicted of conspiracy. The jury likewise convicted all other of the co-defendants on trial except Louis Garcia, about whom the jury was unable to agree.

The following is a summary of the evidence produced at trial relating to the alleged conspiracy.

II. The Principal Alleged Conspirators

Ramond Rossy, the Government's principal witness, a former heroin dealer and self-admitted perjurer. Rossy managed, from October, 1974 to October 1975 to work his way up from a purchaser of small quantities of heroin to become head of the "New York End" of the alleged conspiracy, running a substantial business with several employees and purchasers named as co-defendants. Rossy, already once convicted of narcotics violations, was induced to cooperate with the Government after his arrest for the sale of narcotics to an undercover agent (25-29). In return for his

* Numbers in parentheses refer to pages of the trial transcript.

testimony in this proceeding, Rossy received substantial benefits: 1) all federal charges against him were dropped; 2) the state agreed to accept his guilty plea to a class A-III felony (leaving the possibility of lifetime probation); and 3) the Government agreed to call his cooperation to the attention of State sentencing judge. Moreover, Rossy's wife, although unquestionably guilty of narcotics offenses, was never charged by the State or Federal authorities. Finally, Rossy was able to keep the auto and home purchased from his narcotics earnings (439-453,509). While Rossy's agreement with the Government included the proviso that he not perjure himself, Rossy was unable to keep this part of the bargain; time after time at trial the witness was forced to admit he had deliberately lied to Government authorities, to the Federal Prosecutors, in the Grand Jury, and worst, on several occasions to the jury at trial (438,532,768,770,774,1949,1957). As a result of these numerous perjuries, the defense on several occasions moved to strike Rossy's testimony as incredible (see, e.g., 769,1977).

Nilsa Rossy, Raymond Rossy's girlfriend and then wife, who loaned him the money which enabled Rossy to make his first substantial purchase, an who witnessed and profited from much of her husband's activity. Nilsa was not charged in the indictment.

Benito Cruz, a Government witness also not prosecuted despite his indictment in this case. Cruz began his narcotics involvement as an employee-partner of Fernando Gallardo and then as a partner of Jose Rivera. The Cruz-Rivera partnership purchased heroin directly from California until June, 1975, and sold substantial quantities to a number of buyers, including Rossy. After

Rossy began dealing directly with the California connection, Cruz slipped to the position of one of Rossy's purchasers (919-921, 930, 934-938, 946-951, 962-965).

Jose Perez Lopez, one of the defendants on trial, the courier for the Cruz-Rivera partnership who traveled regularly to California to pick up the heroin. Eventually Lopez began selling heroin -- unbeknownst to Cruz and Rivera -- directly to Rossy; he was the individual who eventually supplied Rossy with the name of the California connection.

Hector Ramos - Iribé, and Humberto Ramos - Serrano (Colorao), two of the members of the California connection who sold Mexican heroin in large quantities to Gallardo, Lopez and Rossy.

Tomas Valles, another of the defendants on trial. From August, 1975 to October 1975, Tomas was a key employee of Rossy who delivered Rossy's heroin to most of the customers at a profit of \$1000 per kilo and who stored money and heroin at his house.

Miguel Valles, a defendant at trial and Tomas' brother and partner. As part of his numerous activities Miguel made a trip to California with Rossy, and also bought substantial quantities of heroin -- up to two kilograms per week -- from him.

Enrique Valles (Gordito), another of the Valles Brothers, a defendant on trial, and a subordinate in the enterprise. Among his jobs, Enrique traveled to California to purchase heroin for Rossy from the connection; he also carried heroin from Rossy's house to Tomas's house, and assisted Miguel when he purchased heroin.

Luis Garcia, another defendant on trial, one of Rossy's "major" purchasers. Garcia regularly purchased heroin in kilogram quantities and expressed the hope of inheriting Rossy's business.

Raymond Valentine ("Animal") a boyhood friend of Rossy's with previous convictions for burglary and assault who surrendered and pleaded guilty to conspiracy shortly after the commencement of trial. Valentine, who testified as a Government witness, began purchasing heroin from Rossy in early 1975. In March, 1975 he continued to purchase and distribute heroin in partnership with appellant Julio Marcelino. After the partnership broke up in June, 1975, Valentine continued to purchase heroin in 1/4 kilogram, 1/2 kilogram and kilogram amounts on a regular basis.

Appellant Julio Marcelino, one of Rossy's least substantial buyers. Appellant began selling Rossy's heroin in partnership with Valentine. From June to September, 1975, Appellant, either alone or with his brother Eddie Marcelino, purchased a 1/4 kilogram of heroin every other week. Appellant was not a regular participant in any other fashion in Rossy's distribution network.

III. Raymond Rossy's Conspiracy

a) October 1974 - January 1975 (Background)

In October, 1974, Raymond Rossy was put on work release, still serving a 1973 narcotics conviction, and began working at a grocery store he had purchased on Suffolk Street on the Lower East Side. Rossy began immediately to re-involve himself in the narcotics trade. Obtaining \$2000 worth of seed money from his

father (455) he purchased an ounce of heroin from a local dealer, one Fernando Gallardo (74), an individual who Rossy subsequently learned obtained his heroin from California (90). Rossy quickly sold the ounce. However, unhappy about dealing with so small a quantity, Rossy next borrowed \$7000 from his girlfriend Nilsa Rodriguez (soon to become Nilsa Rossy) and purchased a 1/4 kilogram of heroin from Gallardo. Rossy continued to re-invest his profits, and purchased 1/4 kilos of heroin thru December, when he purchased a full kilogram from Gallardo (76-77,81).

b) January-March, 1975 (Rossy as Purchaser)

Around New Years Day, 1975, Rossy was introduced to Benito Cruz, who Gallardo claimed was going to take over his business. During a two week period in January, Rossy bought six kilograms of heroin from Cruz at \$50,000 per kilogram (87-89). Following these sales, Cruz departed, and Rossy temporarily lost his source of supply. During February, Rossy purchased heroin from Carlos Nylon, a friend of one of his largest customers, Luis Garcia (91-93).

In March, Cruz returned, and Rossy resumed substantial purchases of California heroin -- in kilogram quantities -- from Cruz and his partner Jose Rivera. (93-95).* During this period, which saw Rossy paroled from work release, Rossy was introduced to Lopez, described by Cruz as the courier who picked up the heroin in Los Angeles (99; see 943-946).

*Rivera and Cruz had previously been associated in the heroin business in late 1974, when they regularly purchased a kilogram a week of heroin from the California connection. (930-932).

Although Rossy was increasing the quantity of heroin he obtained, he continued to sell it off in ounce and quarter ounce quantities (95).

c) April-June 1975 (Rossy obtains the California connection)

In the beginning of April, 1975, Rossy had ingratiated himself sufficiently with Cruz and Rivera that he was permitted to accompany Lopez on a trip to California. He delivered \$80,000 for two kilos of heroin to Cruz and Rivera. He met Lopez on the plane for Los Angeles. After their arrival in Los Angeles, the pair checked into the "Baltimore" (Biltmore) Hotel. Lopez phoned the connection; an hour later, a man named Hector arrived at their door, and Lopez gave him the attache case he had brought from New York. The next day Hector returned with a suitcase which contained brown rock heroin in quarter kilo packages. After receiving the suitcase, Lopez and Rossy got into a cab, went to the airport and took the next flight to New York. They separated, with Lopez retaining the heroin. The next day Cruz brought the heroin to Rossy (104-117). Rossy disposed of the heroin in about a week's time and asked if he could go back to Los Angeles; later in April he made a second trip to Los Angeles with Lopez (117-121). During this second trip Lopez offered to sell Rossy kilograms of heroin "on the side" for \$32,000, several thousand dollars per kilo less than Rossy was being charged by Cruz and Rivera. Thus, in future trips, Rossy would buy heroin from both Cruz and Lopez (122, 126-128). As this side deal with Lopez evolved, it was also agreed that after Rossy had purchased

a total of ten kilograms directly from Lopez, Lopez would give him the number of the California connection (144).

In May, Rossy and Nilsa travelled to Los Angeles to purchase four kilograms of heroin, two directly from Lopez, and two through Cruz (122-134, 1152). During June, Rossy did not go personally to California, but instead sent his brother-in-law, Herman Rivera, three times with Lopez. Rossy testified that as the month went on, his purchases increased: he would buy three to four kilos from Cruz and the same amount from Lopez. At the end of June, Herman travelled with Lopez to California and, pursuant to Lopez' agreement with Rossy, was introduced to the California connection. After their return, Rossy gave Lopez some money, and Lopez, who was about to retire to Puerto Rico, furnished Rossy with the telephone number of the California connection (136-150).

d) July - October (The Rossy operation)

By July, Rossy was thus running a substantial heroin distribution network from California, receiving up to thirteen kilograms of heroin on each trip to Los Angeles, and selling it in New York in quantities of between 1/4 kilogram and one kilogram or more. Rossy's testimony indicates that he or his subordinates made three trips to California in July (161-173); three in August or September (173-180, 344-345); and two apparently in October (355-359). Rossy estimated that between August and October, he imported approximately 40 kilograms of

heroin (496). He also estimated that during the total January - October period covered by the indictment he had purchased and resold between 100-150 kilograms of heroin (473). Merely in the period between August and October, Rossy's profit from the venture approximated \$860,000; Rossy was unable to account for the whereabouts of over \$500,000 of that amount (498-500). On October 29, 1975, Rossy was arrested by undercover agents and began his cooperation with the Government (28-30).

IV. The Employee-Defendants

In addition to Lopez and Herman Rivera, Rossy's enterprise included several key employees.

a) Tomas Valles

In July, 1975, Rossy called Tomas Valles and inquired whether he wished to work for him (179). Rossy had first met Valles in November, 1974, when Valles had purchased heroin from Rossy in ounce quantities. In June Tomas informed Rossy that he planned to work with his brother Miguel Valles (176, 185-189). For a period of several weeks thereafter Tomas purchased heroin from Rossy in 1/4 kilo quantities (190-195). In August, Tomas ceased his role as a buyer and went to work for Rossy storing and delivering Rossy's heroin; Valles was paid \$1,000 for each kilo he delivered to Rossy's major buyers: "Georgie," Luis Garcia, Gypsy, and Ramon Valentine (195). For awhile, Rossy stored the heroin at Tomas' house in Queens (195); after a couple of weeks the heroin was stored at another

apartment, with the money received as proceeds of the heroin stored at Tomas' house (222). Tomas also made deliveries of heroin at a garage he opened with Rossy and Tomas' brothers Ramond and Miquel Valles (218-221). Rossy estimated that Tomas earned \$40,000 for his deliveries of heroin during the three month period (233).

b) Miguel Valles

Rossy also made the acquaintance of Miguel Valles, Tomas' brother. In December, 1974, Rossy obtained Miguel as a customer. Miguel purchased five to seven ounces of heroin at a time (235). Unlike his brother Tomas, Miguel continued as a regular purchaser of Rossy's heroin. In March, Valles increased his purchases to at least a 1/4 kilo a week; the sales took place at Rossy's apartment in Astoria, Queens (238-240), and Miguel often was accompanied by his brother Enrique (Gordito) (245). In June, Miguel began regular purchases of heroin in kilogram quantities (242). When he was purchasing the heroin, Miguel would store the money and heroin at Tomas' house (244). Rossy told Miguel that he purchased his heroin in California from Mexicans. Following one trip Rossy dropped off the heroin at Tomas' house where Miguel was also present (353). On the next trip to California, in October, 1975, Miguel accompanied Rossy (355). Following his arrest, Rossy gave Miguel, at Miguel's request, the telephone number of the California connection (258).

c) Gordito Valles

Rossy first met Gordito Valles in June, 1975. Gordito would accompany his brother Miguel Valles to Rossy's house

and carry the heroin Miguel purchased there (1104). After August, when the heroin was stored with Tomas, Gordito would go there to pick up Miguel's heroin (261-262). In October, Gordito agreed, for a \$3,000 fee, to pick up heroin in California for Rossy (363). Rossy collected \$240,000 for a purchase of ten kilograms of heroin, and placed it in three suitcases. Gordito and Mona Valles, still another of the Valles brothers, eventually met Rossy's brother-in-law, Herman Rivera, in California. They checked into the motel, and eventually received and returned with the ten kilograms of heroin (361-379).*

V. The Purchasers

a) The major purchasers

In addition to Miguel Valles, Rossy identified his major purchasers as one "Georgie" (who did not appear at trial) and Luis Garcia (40). Garcia, the owner of a butcher shop on the Lower East Side, began purchasing ounces of heroin from Rossy in November and December (263). In March, Garcia bought 1/4 kilo quantities of heroin from Rossy, at a price of \$10,000 - 12,500 per quarter-kilo, about once or twice a week (263-264). In September and October, Garcia sharply increased his purchases, buying from two to three kilograms a week at a price of

*In addition to the testimonial evidence against the employees, the Government introduced a sizeable amount of documentary material, consisting in part of Rossy's private papers. The papers, in photocopy form, were admitted over defense objection (49-61).

\$40,000 per kilo. Rossy would often deliver the heroin to Garcia's meat market, in his wife's presence (1112), and would sometimes pick up the money there (266-267). After Tomas became a Rossy employee, he would often deliver the heroin to Garcia (301). In September and October Rossy, Miguel and Tomas Valles also delivered heroin to Garcia in kilogram quantities and picked up money from Garcia at his girlfriend's house in Queens (268). Rossy and his wife Nilsa attended a birthday and anniversary parties for Garcia (274,289) and saw Garcia on other social events. On one occasion, Rossy told Garcia to deliver money owed to him because he needed it to make a trip to California to buy heroin (293). Garcia also expressed an interest to Rossy about taking over business when Rossy decided to retire (313).

b) The Minor Purchasers

Rossy's other buyers were Tomas Valles, Tony Bonilla, "Papo", "Blackie", "Flaco", "Pepe", Raymond Valentine and Julio Marcelino (826,40).

Valentine, a childhood friend of Rossy, met Rossy a few days after Valentine's release from jail on parole from a conviction for assault (1594-1595). After receiving a loan of \$1000 from Rossy, Valentine twice obtained several ounces of heroin from Rossy, which he proceeded to attempt to resell (1599-1603). In the beginning of March Valentine began a more

regular purchase of heroin from Rossy, in partnership with an acquaintance -- appellant Julio Marcelino. * Between March and June the partnership purchased about 10 eighth or quarter kilograms of heroin from Rossy (160²-1609). The first purchase of an eighth of a kilogram was made by Valentine, with appellant Marcelino waiting outside Rossy's grocery store. On their second purchase Marcelino was introduced to Rossy. For later purchases at Rossy's apartment in Queens, Valentine would go with Rossy to his bedroom where the heroin was kept, while appellant would remain outside the building or in the living room (1613-1622). After obtaining the heroin, the pair would divide it with Valentine selling to customers in Brooklyn and appellant, to customers in Manhattan.

In June 1975 the partnership ceased, allegedly because Valentine was not doing enough to sell the heroin (315). Following the breakup of the partnership, Valentine continued to purchase heroin from Rossy, about once a week, in quantities ranging up to a kilogram per week (342).

In contrast, appellant's purchases never increased over quarter-kilogram quantities. In June, for one month, appellant purchased a quarter-kilogram a week, in partnership with Eddie

* Of the many Government witnesses appearing at trial, three (Rossy, Nilsa, and Valentine) testified with respect to appellant's alleged activity.

Marcelino, his brother (316-318). Thereafter, appellant's purchases became more infrequent. During August and September appellant purchased a quarter-kilogram of heroin every other week, he ceased purchasing entirely in mid-September, more than a month before Rossy's arrest (319-320).

Appellant often picked up the heroin at Rossy's house, sometimes accompanied by his wife and child; occasionally Rossy delivered the heroin at appellant's apartment in a public housing project near Houston Street and Avenue D in Manhattan. Still other times appellant picked up heroin at Rossy's grocery store on Suffolk Place (322-327). Unlike Rossy's other customers, appellant never picked up heroin from Tomas Valles or Rossy's other messengers. Only Rossy delivered to Marcelino (195-196).

Rossy did not testify that he had ever discussed the vast scope of his heroin operation with appellant Marcelino. In addition to his purchases of heroin, the Government produced the following evidence of appellant's involvement with Rossy. Over a month after appellant had ceased purchasing heroin from Rossy, he was present at Tomas's house while Rossy was preparing to send Gordito and Mon~~s~~ Valles to California (325); Marcelino had signed his name to lease of an apartment used by Rossy and had purchased some furniture and cold cuts for the apartment (there were no transactions of heroin or deliveries of money at that apartment) (326-328); Marcelino purchased a 1973 Buick

Riviera from Rossy (330); Marcelino once delivered some heroin to Miguel Valles (330); he was present at the Valles' garage to have the car fixed, but never when there were any heroin transactions (332); along with Valentine, Cruz, the Valles brothers and dozens of other people, he was present at Rossy's wedding in July, 1975 (172-173). Estimating as best as possible from the Government testimony, it appears that appellant's total purchase of heroin from Rossy was between four and five kilograms of heroin.

VI. The Motion to Dismiss

At the close of the Government's case counsel moved for a judgment of acquittal, inter alia, on the following grounds:

I would add to my motion, your Honor, that this case, this conspiracy charge, seems to be of the chain variety as against the wheel variety-type conspiracy and that as the evidence has unfolded here concerning the defendant Marcelino it would appear, crediting the evidence as truthful, that Marcelino was at the tail end of the chain, namely, a buyer from Rossy, a buyer who apparently was distributing on the streets, it is suggested.

The latest holding of the Court of Appeals with which I am familiar--I haven't read the advance sheets lately--is the Bertolotti case, which cites Sperling, and I think that generally the holding of these cases is that the Court of Appeals disapproves the lumping together of innumerable people in a conspiracy of this sort and the standard seems to be as to fringe or marginal or end-

of-the-chain-type persons, such as Marcelino is, that is those particular defendants' acts and declarations and doings were of such a character that it was likely that they understood and knew the extent of the entire conspiracy, in this particular case, had knowledge or could reasonably have inferred the trips to California, the enormity of Rossy's business, the enormity of the Californians' holdings and business, if those and people either knew or could infer, then they were suitably in the conspiracy.

If, on the other hand, they didn't know, nor could you infer from the facts that they should have known, in that event they do not belong in that conspiracy.

(1977-1978)

The Court denied Appellant's motion to dismiss.

(1979)

VII. The Court's Charge

In his instructions on the intent required to prove membership in the conspiracy, Judge Frankel stated:

What I do want to do in very brief compass is mention to you the alleged varying roles of these six defendants so that you will understand what you must consider in deciding whether the government has proved its case, and specifically on the element we are considering at this moment, whether the element of membership or participation in the conspiracy has been made out as against one or more defendants.

Now, as a kind of neutral form of presentation I am going to take the defendants for this purpose in the order in which their names appear in the indictment and remind you, though I am sure you have it more or less in mind, of what the government claims or charges or alleges the evidence has shown about their several roles in the alleged conspiracy.

(2455)

After describing the role of Lopez and the Valles Brothers, the Court charged:

The defendants Luis Garcia and Julio Marcelino are accused mainly of being purchasers of heroin in substantial quantities for resale from Raymond Rossy.

Marcelino is accused of having been for a time a partner of Raymond Valentine and then a Rossy customer and reseller on his own.

Garcia is charged mainly with having been a customer. There is some claim that having an overall view of Rossy's enterprise, Garcia expressed hope of possibly inheriting it.

It is charged then as to Marcelino and Garcia, the last two I have mentioned, that they functioned as did other major purchasers from Rossy, that is, they were in the branch of the enterprise at the New York end distributing as resellers here, knowing and believing, among others, customers of Raymond Rossy and that they thus served with his other customers as this more or less ultimate end-of-the-chain distribution on which the flow of illegal heroin from California to here ultimately depended.

Now, I talked about them as purchasers as a prelude to making this point to you that you must keep in mind: You must understand that an isolated purchase from an operator like Rossy would not, without more, make the buyer a member of the conspiracy. And so if you are looking at the question of membership, as you will be, for a defendant, and you find that the defendant was a buyer from Rossy, you must also determine whether that defendant had knowledge of a Rossy enterprise larger than his own isolated transaction and whether that buyer had a understanding at least in general terms of how his purchases would tie in with Rossy's overall enterprise.

Now still talking about the buying kind of charge, I will tell you that in this connection it is not necessary to find that a particular defendant you are considering knew everyone in this alleged conspiracy or knew the details of the entire operation or knew the exact source or even the exact location of the source.

What I am saying is that to find a defendant in the capacity of buyer, to have been a member of this heroin conspiracy, you must find that the defendant had at least a sense of the scale of the alleged conspiracy.

To be a member of this conspiracy, a buyer must have had an awareness of the larger dimensions of Rossy's activities, the fact that Rossy was an intermediate between larger suppliers and them, the fact that he had other buyers made it possible for him to be moving quantities of heroin.

There must have been this kind of awareness, I say, in order to make a person as a buyer a member.

I also tell you that the buyer-member need not be shown to have known all these other individuals, the buyers or the suppliers or others, but merely to have had a sense, an understandings of their existence and their place in the nature of this kind of illegal enterprise.

Now, in considering whether there was such an awareness in the case of anybody, if you find that any of these were purchasers, take into account all the circumstances which shed light on this kind of question, and I will tell you, not exhaustively, but you may consider in this connection, among other things, the size of these purchases, if you find purchases to have been made, the amounts of money involved, the frequency or regularity of those transactions.

You may also consider the connections or relations, if any, between one buyer and another, evidence of partnerships, evidence showing an awareness in the case of any given defendant buyer that Rossy had sources for the substantial quantities of heroin in which it appears to be agreed that he was dealing.

(2457-2460)

Following the charge, counsel for appellant Marcelino objected to the lumping together of Marcelino and Garcia as major purchasers, claiming that the Government's allegations were that Garcia was a major purchaser, Marcelino a minor one. The Court overruled the objection, following which the Assistant United States Attorney stated that it was the Government's contention that appellant and Garcia were both major buyers (2474-2477).

The jury began deliberations on March 17, 1976 (2480 a). The following day, they returned and asked the court to re-explain what constitutes "involvement" in the conspiracy. In recharging the jury the Court repeated the Government's contention of the differing role of the defendants. Counsel moved for a mistrial contending that the instruction constituted a marshaling of the evidence (2514-2528).

In March 20, the jury found appellant guilty of the conspiracy (2612). All other co-defendants at trial were convicted except Garcia. None of the other convicted co-defendants have appealed their judgments of conviction.

STATEMENT OF POSSIBLE ISSUES

A. Sufficiency - Multiple Conspiracy

The principal potential issue raised in this extended trial is whether the evidence proved a single large conspiracy to transport heroin from California to New York and then to distribute it through various buyers rather than several conspiracies between Rossy and different buyers to distribute heroin (see Kotteakos v. United States, 328 U.S. 750 (1946)). The collateral issue is of course whether appellant was a member of any large conspiracy which was proved.

The evidence at trial, taken most favorably to the Government showed a continued series of purchases by Rossy worth millions of dollars, of over one hundred kilograms of heroin from a source in California; the heroin was then distributed by Rossy to various buyers. Accepting the Government's evidence, the jury could have found appellant to have participated in purchases, over several months, of up to five kilograms of heroin directly from Rossy.

In addition to the above, the evidence also showed that appellant knew at least some of Rossy's other buyers. Appellant had once delivered heroin to Miguel Valles, and he was present when his former partner, Raymond Valentine, purchased heroin. Moreover, appellant was present at Tomas Valles' house when Rossy was preparing the Valles brothers to go to California to obtain heroin.

The above evidence, if accepted by the jury permitted a finding that appellant was dealing in substantial quantities of heroin at regular intervals; that he therefore was aware that the conspiracy had a "scope" beyond his participation; and that he was in fact aware that Rossy was selling substantial quantities of heroin to other buyers. Given this evidence, the jury was permitted, under the law of this Circuit, to find a single conspiracy of which appellant was a part. See, e.g., United States v. Tramunti, 513 F.2d 1087, 1106 (2d Cir.), cert. denied, 423 U.S. 832 (1975); United States v. Ortega-Avarez, 506 F.2d 455 (2d Cir. 1974), cert. denied, 421 U.S. 910 (1975); United States v. Sperling, 506 F.2d 1323, 1340-1343 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975); United States v. Mallah, 503 F.2d 971, 983-84 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975); United States v. Sisca, 503 F.2d 1337, 1345 (2d Cir.), cert. denied, 419 U.S. 1008 (1974); United States v. Arroyo, 494 F.2d 1316, 1319 (2d Cir.), cert. denied, 419 U.S. 827 (1974); United States v. Bynum, 485 F.2d 490, 495-497 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974); United States v. Agueci, 310 F.2d 817 (2d Cir. 1972), cert. denied, 372 U.S. 959 (1963).

B. Admission of Evidence

Counsel for Miguel Valles objected to the admission of photocopies of Rossy's papers, the originals of which the witness had destroyed, on the ground that "copies cannot be

admitted unless it can be shown there are good reasonable circumstances for the destruction of the originals" (53), a standard which could not be met in this case.

However, counsel's objection fails to meet either of the standards for exclusion of duplicate originals.

Under the Federal Rules of Evidence a duplicate such as a photocopy "is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." F. R. Evid. 1003. Here, the Government showed

that the photocopies were made by it from the originals and that the photocopies were retained by it so no "genuine" question of authenticity was raised. Nor did counsel for Miguel Valles cite any explicit prejudice suffered by admission of duplicates; he argued, rather, that there were no "mitigating circumstances" for destruction of the originals. Finally, we note that while there was a great deal of documentary evidence admitted relative to the other co-defendants, there was very little such evidence admitted against appellant, and none which directly proved narcotics involvement. Thus, the admission of such evidence against appellant even if it were found to be error would undoubtedly be held harmless.*

*Counsel for appellant objected to the introduction of two pieces of documentary evidence -- a liquor bill and furniture bill. Both were admitted to show appellant's interest in an apartment he allegedly rented with Rossy. Counsel objected on the grounds of relevancy.

(Footnote continued on next page)

C. Motion to Strike Rossy's Testimony

On several occasions during trial, the defense moved to strike Rossy's testimony, on the ground that his many perjurious statements on questions such as whether and how much money he had "stashed," when he had last spoken to a witness, and the extent of his father's knowledge of his heroin involvement rendered his testimony incredible.

The motion was properly denied, since it is the exclusive function of the jury to determine the credibility of Government witnesses with the proviso that the perjuries be placed before the jury. United States v. Weinstein, 452 F.2d 704, 713-714 (2d Cir. 1971), cert. denied sub nom Gruenberger v. United States, 406 U.S. 917 (1972); United States v. Taylor, 464 F.2d 240, 245 (2d Cir. 1972).

In this case, Rossy's perjuries were laid out squarely before the jury. Moreover, Judge Frankel carefully instructed the jury on the means to determine credibility and reminded them they had in fact heard perjury in the courtroom (2466).

(Footnote continued from last page) . . .

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." F. R. Evid. 401. In this case, appellant's knowledge of the scope of the Rossy enterprise was directly at issue. Clearly, any social acquaintance between the two men was potentially relevant; in turn, since proof of a joint interest of an apartment was relevant to the question of their association, the Court did not abuse its discretion in admitting the evidence.

D. The Prosecutor's Rebuttal Summation

A number of objections were raised to the prosecutor's rebuttal summation which, in addition to some questionable comments, can perhaps be described as sarcastic in its general tone (2393, 2395, 2401-2402, 2408, 2416, 2426-2427).

It is submitted that, taken as a whole, however, there is no non-frivolous argument that the summation constitutes prejudicial errors. The prosecutor's rebuttal was in part responsive to the extremely vigorous defense attacks on the prosecution's main witnesses (see 2393, 2401-2403, 2426-2427). Compare United States v. Santana, 485 F.2d 365, 370-371 (2d Cir.), cert. denied, 415 U.S. 931 (1973); United States v. LaSorsa, 480 F.2d 522 (2d Cir.), cert. denied, 414 U.S. 855 (1973). Moreover, for virtually all of the questionable comments, the Court sustained objection and properly instructed the jury to disregard the comments (e.g., 2402, 2427); see United States v. Mallah, supra, 503 F.2d at 978-979 (2d Cir. 1974). Furthermore, the character of the jury's deliberations in this case indicates most strongly that the remarks were not considered. The jury painstakingly reviewed the evidence produced in this almost three week trial with respect to each defendant. Finally, we note that, for remarks far more questionable than any committed here, the Court has often not found prejudicial error, even where the trial court has failed to sustain objection. Compare, United States v. White, 486 F.2d 204 (2d Cir. 1973), cert. denied, 415 U.S. 980 (1974); United States v. Bentner, 457 F.2d 1174, 1178 (2d Cir.), cert. denied, 409 U.S. 842 (1972).

E. The Court's Charge

In charging the jury on how it might find membership in a conspiracy, the Court differentiated between the employees and purchasers, charging that a purchaser could not be convicted unless he had knowledge of the scale of the Rossy enterprise. In describing the defendant-purchasers, the Court stated:

. . . the defendants Luis Garcia and Julio Marcelino are accused of being purchasers of heroin in substantial quantities for resale from Ramond Rossy.

(2457)

Counsel for appellant objected to the charge on the ground that the evidence showed, and the Government contend-
ed, that appellant Marcelino did not purchase quantities of heroin as substantial as those attributed to Garcia. The Court overruled the objection.

This charge was a restatement of the basic Government position. Both Marcelino and Garcia were accused by the Government of being buyers of substantial quantities of heroin (2477). Moreover, there were repeated admonitions of the trial court that guilt must be individually determined (see 2440, 2445, 2449-2450). Cf. United States v. Tramunti, supra, 513 F.2d at 1107; United States v. Bynum, supra, 485 F.2d at 497.* Finally, since Garcia, the pur-

*Similarly, the Court's recharge on involvement in the conspiracy was not erroneous. United States v. Tramunti, supra; United States v. Bynum, supra. The Court merely responded to the jury's request to redefine involvement in the conspiracy by restating each defendant's alleged role, and the quantities of proof necessary to find a defendant to be a participant. Moreover, this charge was most important, and beneficial for appellant Marcelino and Garcia, the purchaser-defendants, who had lesser roles in the conspiracy.

chaser of larger quantities, was not convicted, there is no basis for arguing that appellant was prejudiced by being lumped together with Garcia.

F. The Jury Request

During its deliberations, the jury made the following request for information:

2. Can we hear again that part of Rossy's testimony referring to the birthday present from Julio Marcelino.
(2549)

In response to the jury's request, the Court submitted to the jury the following excerpt from the trial record:

Did you ever receive money from him in paying for drugs in the presence of a third party from the beginning of time -- of your relationship -- to your end of it?

A Yes. Yes.

Q When? Where? In whose presence? Give it to us one at a time.

A One time he brought a package to my wife.

Q Excuse me. Is that the first -

A I think that was the only time.

Q One time he brought a package to your wife?

A Yes, a gift. And he put the money inside the gift and he gave the gift to my wife. When my wife opened it, she seen the money and she told him, "What is this?" And then he told her that's my money, to give it to me.

Q So it is your information, that he, Marcelino, did not tell your wife why he was paying this money? She just found money together with a gift and Marcelino is supposed to have told her to give you the money, right?

A Yes.

(837)

The defense objected to the introduction of this testimony, since the request was for Rossy's testimony on a "birthday gift" and the testimony here was merely about a "gift" (2565).

The Court's decision was a proper response to the jury's request. The only testimony by Rossy about a gift from appellant to Mrs. Rossy was the section read to the jury, and Mrs. Rossy had testified that the gift came during her birthday. When the jury requested to see Rossy's testimony about the birthday gift, the testimony read was the only evidence they could possibly have meant.

CONCLUSION

FOR THE FOREGOING REASONS, THERE ARE NO NON-PRIVOLOUS ISSUES TO BE RAISED FOR THIS COURT'S REVIEW; ACCORDINGLY, THE MOTION OF THE LEGAL AID SOCIETY, FEDERAL DEFENDER SERVICES UNIT, TO BE RELIEVED AS COUNSEL SHOULD BE GRANTED.

Respectfully submitted,

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